

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN M LAMIE,

4 Petitioner :

5 v. : No. 02-693

6 UNITED STATES TRUSTEE. :

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8 Washington, D. C.

9 Monday, November 10, 2003

10                   The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:03 a.m.

## 13 APPEARANCES:

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15     the Petitioner.

16 LISA S. BLATT, ESQ., Assistant to the Solicitor General,  
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18 the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 02-693, John Lamine v. the United States Trustee.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN  
ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice, and may it please the Court:

The parties to this case agree on one thing, and that is that section 330(a) of the Bankruptcy Code contains a mistake of some kind. Now, we disagree about what the mistake is, but there clearly is one.

The United States Trustee, for all of its rhetoric about the statute's plain text, actually says that the statute contains two errors in two different places, but the list of compensable providers inadvertently includes a reference to the attorney and that the statute's so-called payees' list inadvertently omits the necessary conjunction or.

We say there was a different mistake, that the payees' list inadvertently omits the reference to the debtor's attorney, and our reading of the two is the superior one. It is the one that's most consistent with

1 the -- the structure of the statute as a whole, with the  
2 past bankruptcy practice, with the legislative history,  
3 and frankly, with common sense.

4 QUESTION: Mr. Goldstein, who's covered by fees  
5 available for a professional person employed under section  
6 327 or 1103?

7 MR. GOLDSTEIN: That would be an attorney who's  
8 retained by a trustee, and according to the U.S. Trustee,  
9 it would also be an attorney retained by a debtor in  
10 possession in a chapter 11 case.

11 The --

12 QUESTION: But not chapter 7.

13 MR. GOLDSTEIN: That's correct. The reason --  
14 and let me take you through the statutory scheme, and I  
15 should take you -- everyone to the text, and it's in the  
16 blue brief at page 2a of the appendix.

17 QUESTION: That's, obviously, of critical  
18 importance. One piece of background information please.  
19 Could the chapter 11 court have authorized the debtor's  
20 attorney to do this work? I mean, how does that work? I  
21 -- and I -- I do agree that the chapter 7 -- the -- the  
22 debtor's attorney really is often required to do some very  
23 important things to get the chapter 7 filed. But if the  
24 -- if it's an 11 first, as this one was, could the chapter  
25 11 court have authorized the work to be done?

1                   MR. GOLDSTEIN: According to the U. S. Trustee,  
2 no. Let me, if I could, just step back and put this in  
3 context. This is a converted case, just like, for  
4 example, the Hartford Underwriters case this Court had a  
5 few terms ago. And so I take it the question might be,  
6 look, if they were a debtor's attorney at one point -- and  
7 we all agree that for the chapter 11 proceedings, they  
8 clearly were authorized to be paid under 330(a) -- could  
9 that authorization have continued? And I think the answer  
10 is no because at some point there will be a fee  
11 application and the fee application will be under 330(a),  
12 and what will happen is exactly what happened in this  
13 case. The U. S. Trustee or the objector will say, look,  
14 for the period that it was a chapter 7, there's a -- a gap  
15 in the statute.

16                  QUESTION: Even if you tell the court in the  
17 chapter 11 proceeding, we're going to go to 7 and we need  
18 the debtor to do some work, the -- the court just has no  
19 power to authorize that work I guess is your position.

20                  MR. GOLDSTEIN: Oh, no, no, no. Our position is  
21 to the contrary. The U. S. Trustee's position is that it  
22 -- they're without power. I think it's an important  
23 point.

24                  We view the structure of the statute to operate  
25 just as it has for -- the Bankruptcy Code has for 100

1 years, and that is, that the bankruptcy court is a  
2 gatekeeper. It has to decide, in what are now the literal  
3 terms of the statute, whether the services of the debtor's  
4 attorney are both necessary and beneficial to the estate.

5 The position of the U.S. Trustee is that even  
6 when the services are both necessary and beneficial to the  
7 estate -- that is to say, even when they produce more  
8 money for the creditors, which is the whole point, after  
9 all -- you still can't perform the services and be  
10 compensable --

11 QUESTION: Well, why can't the -- I mean, their  
12 argument is the trustee can do it. The trustee's object  
13 is the maximize the -- the value for the estate and so on,  
14 and -- and therefore there's no built-in conflict there.  
15 Why isn't that a way out of this drafting mess?

16 MR. GOLDSTEIN: Because there are things that  
17 the Bankruptcy Code assigns as responsibility to the  
18 debtor, not the trustee. And second, the provision that  
19 -- and so let me -- let me separate --

20 QUESTION: No, but is there any conflict in the  
21 trustee saying, look, you can do these things for the  
22 debtor and I'll pay you?

23 MR. GOLDSTEIN: Yes. Let me take you to the  
24 relevant statutory provision. This one is in the gray  
25 brief in the appendix. That's 327(e). There is a passing

1 suggestion in the Government's brief -- and, Mr. Chief  
2 Justice, that is at 1a of the gray brief. It's at the  
3 bottom. There is a suggestion by the U.S. Trustee that if  
4 the debtor's attorney really needs to do something, the  
5 trustee's lawyer will hire the debtor's lawyer, and so it  
6 all will work out in the end, and I take it that's a point  
7 you're picking up.

8           The statute is much more limited than that. It  
9 says the trustee, with the court's approval, may employ  
10 for a specified special purpose, other than to represent  
11 the trustee, and it goes on to say, an attorney that has  
12 represented the debtor.

13           The way this works -- and we have tried very  
14 hard to find out how often this happens. Mr. Lami e's  
15 firm, for example, has been doing bankruptcy for 23 years  
16 and has represented the debtor in more than 4,000 cases.  
17 In that entire time, the trustee has hired the debtor's  
18 counsel two times.

19           QUESTION: Maybe -- not to -- not to be cute  
20 about it, but maybe those are the only times he should  
21 have.

22           MR. GOLDSTEIN: Well, we know that that's not  
23 the case, Justice Souter, because the Bankruptcy Code  
24 does, as Justice Kennedy has suggested, give important  
25 responsibilities to the debtor qua debtor, not that are

1 distinct from the duties of the trustee. And let me give  
2 you an example of that. And so those are jobs that can't  
3 be handled by the trustee. They're the responsibility of  
4 the debtor.

5 QUESTION: But is there any conflict -- any  
6 conflict of -- of -- you know, ethical or quasi-ethical  
7 conflict if the -- if the trustee says, look, these  
8 responsibility -- you've got to shoulder these  
9 responsibilities. It's very difficult for somebody who's  
10 not a lawyer to do it. Okay, I -- I will employ a lawyer  
11 to help you. Is there -- is there any conflict between  
12 the trustee and the lawyer there?

13 MR. GOLDSTEIN: Yes, actually there is. The --  
14 the problem is that the debtor and the trustee sometimes  
15 have divergent interests. That's why the legislative  
16 history to 327(e) says we want to limit the times that the  
17 trustee will hire the debtor's lawyer. But --

18 QUESTION: Would you give me -- just give me an  
19 example, a garden variety example --

20 MR. GOLDSTEIN: An exemption fight.

21 QUESTION: -- of a conflict situation?

22 MR. GOLDSTEIN: An exemption fight.

23 QUESTION: Yes, okay.

24 MR. GOLDSTEIN: When you're trying to -- to  
25 decide whether or not the debtor gets to claim an



1 exemption.

2 And so let me give you a couple more examples  
3 just about how this operates.

4 QUESTION: Before you do, Mr. Goldstein, is it  
5 true that in most chapter 7's, this is an academic  
6 question because there's not any money to pay even the --  
7 any -- the administrative creditors?

8 MR. GOLDSTEIN: Yes, but the fact that in  
9 relative terms, in terms of the percentage of chapter 7's,  
10 it's not that big a deal does not mean in absolute terms  
11 it's not. We know, for example, that there are at least  
12 40,000 asset cases. In particular, we have complicated  
13 business cases. Hartford Underwriters, which you all had  
14 as a case, is an example.

15 QUESTION: These end up as chapter 7 cases?

16 MR. GOLDSTEIN: Yes, Mr. Chief Justice. There  
17 are a lot of converted business cases. Generally when we  
18 believe there's going to be an asset, they are pursued as  
19 a 11's, but lots of times the ability to keep up with the  
20 creditors breaks down and they can get converted to 7's.  
21 And --

22 QUESTION: Mr. Goldstein, you know, Congress had  
23 this problem brought to its attention a number of times  
24 and -- and has chosen not to enact something, putting that  
25 language back in. That I find somewhat persuasive.

1                   MR. GOLDSTEIN: In all candor, Justice O'Connor,  
2 I think that's a point in their favor. It's just not one  
3 that's going to overcome the other indications of  
4 Congress' intent. So let me speak to that and then what  
5 the other --

6                   QUESTION: Before you get to the intent of  
7 Congress, I'm rather stuck with the language. I mean,  
8 what we'd have to do, in order to come out your way, is to  
9 read the words, the court may award to a trustee, an  
10 examiner, a professional person employed under 327 or  
11 1103, and the lawyer. Is there one case that you've found  
12 -- I'm sure you've looked because you're very thorough --  
13 in the history of the world --

14                   (Laughter.)

15                   QUESTION: -- where -- I couldn't find any, but  
16 I don't know all the cases in the history of the world --  
17 where -- where, in fact, a court, when faced with a  
18 definite list like this and unable to say, and other such  
19 persons or -- fool with the language. Maybe you'll think  
20 of some way of doing it -- where a court is simply stuck  
21 in words of insignificance that weren't there because they  
22 thought the legislature had made a mistake. Can you give  
23 me a list of the most relevant such cases, if there are  
24 such?

25                   MR. GOLDSTEIN: Yes, and then I will come back

1 to Justice O'Connor.

2 The point here is that there are a number of  
3 cases -- and we cite these in our brief -- that the  
4 expressio unius canon, on which you're -- to which you're  
5 adverting --

6 QUESTION: No. I'm not adverting to any canon.

7 MR. GOLDSTEIN: Well --

8 QUESTION: I am adverting to the fact that the  
9 words aren't there.

10 MR. GOLDSTEIN: Justice Breyer, let me explain  
11 to why I think you are, and then you can tell me why I'm  
12 misguided, I'm sure.

13 (Laughter.)

14 QUESTION: No. All I want is the name of a case  
15 where a court --

16 MR. GOLDSTEIN: United States v. Wilson.

17 QUESTION: All right.

18 MR. GOLDSTEIN: United States v. Wilson, and  
19 then I'll come back to why I think their argument is an  
20 expressio unius one, and then I'll explain to you U.S. v.  
21 Wilson. It's on page 10 of the yellow brief that we  
22 discuss it.

23 The statute says that the court may award to a  
24 trustee, an examiner, or professional person employed  
25 under section 327. I'm back on 2a of the blue brief. It

1 has a list. It doesn't say only, and there are many  
2 cases. There are legions of cases in which a list is not  
3 regarded as exclusive when -- I think there's a  
4 presumption of exclusivity, but when the contrary  
5 indications in the text or the history of the drafting or  
6 something else tells you that Congress didn't intend the  
7 list to be exclusive, and this is such a case.

8           The reason I cite U.S. v. Wilson to you is  
9 that's a case in which the statute referred specifically  
10 to the Attorney General. The Attorney General, before the  
11 statute was revised, was supposed to compute the amount of  
12 time that is given as credit from pretrial detention.  
13 Congress, as it did with section 330, rewrote the statute  
14 entirely, and this Court said, look, we admit that the  
15 reference to the Attorney General is gone, but it looks  
16 like it just got lost in the shuffle if we look at the  
17 other indications of Congress' intent.

18           Now, let me just make one other important --

19           QUESTION: Well, you think this just got lost in  
20 the shuffle?

21           MR. GOLDSTEIN: Yes.

22           QUESTION: That's why I'm asking you a question  
23 that I hope --

24           MR. GOLDSTEIN: Yes.

25           QUESTION: -- you'll be allowed to answer --

1 (Laughter.)

2 QUESTION: -- about what about Congress'  
3 opportunity to correct it --

4 MR. GOLDSTEIN: Yes.

5 QUESTION: -- which they didn't --

6 MR. GOLDSTEIN: Well, this Court has never  
7 really taken that view of subsequent legislative history,  
8 Justice O'Connor, but let me turn to the events.

9 In 1997, there were two bills that were proposed  
10 in the Congress that were a part of general correction  
11 legislation that had a variety of different provisions,  
12 including one fix for this one. I think the important  
13 point is that at that time, the only case in the circuits  
14 interpreting the statute as it then stood went our way.  
15 It was the 1996 decision of the Second Circuit in Ames.  
16 And so I don't think you can infer from the fact that  
17 Congress didn't change the statute to confirm the rule in  
18 the circuits means that they intended to reject it.

19 QUESTION: Isn't there a current -- isn't there  
20 a current correction -- bankruptcy technical correction  
21 bill pending, and isn't this absent from it?

22 MR. GOLDSTEIN: It is, but Justice Ginsburg --  
23 so now we have not just the failure to enact legislation  
24 exists, but the U.S. Trustee is relying on the failure to  
25 enact legislation that doesn't even exist.

1           The point, I think, is that, look, if you read  
2 the statute, if you look at it right now, it's simply  
3 ambiguous. There's a reference to the attorney that's in  
4 there, and a reference to the attorney that's missing.

5           This is not a case -- and this is absolutely  
6 critical -- in which there was a reference to the  
7 attorney, there was only one, and it disappeared, and  
8 we're asking you to read it back in. Our position is that  
9 the statute, as written, stands essentially in equipoise.  
10 The two references to the attorney in the 1978 version of  
11 the statute were inextricably intertwined, and so if you  
12 look at the text right now, the fact that Congress hasn't  
13 changed it doesn't tell you anything about whether or not  
14 they intend it to be in there or not to be in there  
15 because the split is almost even. There's one --

16           QUESTION: But now it has been called to their  
17 attention and it isn't in the bill making other technical  
18 corrections.

19           MR. GOLDSTEIN: Justice Ginsburg, I agree, and I  
20 -- I'm obviously not making this point well enough. What  
21 I'm saying is that the inference that would be normally  
22 drawn from the failure to fix a statutory error doesn't  
23 cut in either direction here because, as I began in the  
24 introduction, both sides believes there -- believes that  
25 there's an error. But we both think there's a mistake in

1 the statute. The fact that Congress hasn't corrected the  
2 mistake doesn't tell us anything about what the mistake  
3 was.

4 QUESTION: But, Mr. Goldstein, you're  
5 overlooking one -- one other argument I think. Before  
6 this statute was enacted, the Association of Bankruptcy --  
7 whatever the name of it is -- called their attention to  
8 this drafting error and said we think it's a drafting  
9 error.

10 MR. GOLDSTEIN: We -- yes.

11 QUESTION: And nothing was done.

12 MR. GOLDSTEIN: Justice Stevens, let me put that  
13 series of events in slightly more context, and that is  
14 that in the House, when the bill was not pending there,  
15 there was a hearing, and this is one line in a 718-page  
16 record of just written materials submitted that says there  
17 is an inadvertent omission.

18 The -- the one canon of construction that runs  
19 through this Court's bankruptcy cases --

20 QUESTION: Let me just add one thought. They  
21 said this appears to have been some minor drafting errors,  
22 including the apparently inadvertent removal of debtors'  
23 attorneys from the list of professionals whose  
24 compensation awards are covered by 330(a). NACBA does not  
25 oppose this provision since it contains language and so

1   forth and so on. So they -- it's -- one can read that as  
2   saying even with the error, we don't -- we don't oppose  
3   the provision.

4                QUESTION: Right. We actually -- that  
5   reference, we do not oppose this provision, we believe, in  
6   the context of those remarks, could be referring to the  
7   addition of section (a) (4) (B). Congress in 1994 added a  
8   provision that's much debated in the briefs about chapter  
9   12 and 13 bankruptcies. Remember, this is the National  
10   Association of Consumer Bankruptcy Attorneys, and what  
11   they were not objecting to is the addition of a provision  
12   that relates to consumer bankruptcies.

13               But let's be perfectly clear. The -- the  
14   United States has scoured the legislative record of this  
15   change and has found one sentence in one House hearing,  
16   and it says that it was a mistake. The principle in  
17   bankruptcy is if there's a statutory change and it's not  
18   clear on the text or at least in the legislative history,  
19   it's presumed not to change --

20               QUESTION: But isn't -- isn't it possible also  
21   to read this as saying, yes, you made a mistake, but even  
22   so, it's still a good bill and we think even with the  
23   mistake, we're in favor of it, and then -- and then  
24   Congress looks at it and says, yes, we did make a mistake,  
25   but -- but the -- our -- we'll stick to that decision



1 because the United States' position now is that that's a  
2 wise -- the provision is a wise one?

3 MR. GOLDSTEIN: It is important to note, of  
4 course, that when the Department of Justice and the U.S.  
5 Trustee commented on the bill at the time, they did not  
6 say that this would be the result of the statute or that  
7 they proposed it.

8 But I don't -- Justice Stevens, I don't think  
9 that when someone says there's a mistaken omission -- and  
10 remember, it's of course at the time when the U.S. Trustee  
11 says language is mistakenly included at the same time.  
12 When someone says there's a mistake, that's a very  
13 different thing from Congress -- let's engage in all of  
14 the false assumptions that people actually read this thing  
15 in the Senate and people paid attention -- that Congress  
16 actually acknowledged, yes, we're changing bankruptcy  
17 policy. The standards for changing bankruptcy policy,  
18 particularly a policy as settled as this one, are much  
19 higher --

20 QUESTION: Well, are the standards for changing  
21 bankruptcy policy in Congress different from the standards  
22 of changing other kinds of policy?

23 MR. GOLDSTEIN: Mr. Chief Justice, the  
24 indications in this Court's precedents -- the answer to  
25 that question is yes.

1                   QUESTION: And what -- what precedents are  
2 those?

3                   MR. GOLDSTEIN: Those would be principally the  
4 line of cases that begin with *Midatlantic*. We cite  
5 several of them, *Hartford Underwriters*, *Ron Pair*, that  
6 sort of thing. The Court has recognized, going back to  
7 well before the '78 code and subsequent to the '78 --

8                   QUESTION: Well, but some of the -- the  
9 *Midatlantic*, for example, was shortly after the Bankruptcy  
10 Code was adopted succeeding the 1898 act, and there, there  
11 was probably a good reason for saying when you have that  
12 sort of a comprehensive revision, the presumption is that  
13 if something -- it's not clear where something was  
14 changed, we meant to retain the old. But this wasn't that  
15 sort of thing.

16                  MR. GOLDSTEIN: That's correct, Mr. Chief  
17 Justice, but I think that the relevant answer would be  
18 that *Cohen v. de la Cruz*, which deals with a much more  
19 minor revision of the Bankruptcy Code than even this one,  
20 the 1984 revision applies the same principle and that is  
21 this Court has recognized that the provisions of the  
22 Bankruptcy Code are incredibly interrelated. There's a  
23 longstanding practice that has built up over time, and  
24 that Congress doesn't lightly change it.

25                  And let me talk about why this would have to be

1 the --

2 QUESTION: At some point, will you go back to my  
3 first question?

4 MR. GOLDSTEIN: Yes.

5 QUESTION: I just -- you have just a few --

6 MR. GOLDSTEIN: Yes.

7 QUESTION: I mean, why -- because I looked at  
8 United States v. Wilson. It doesn't seem like this at  
9 all. The statute said there said a defendant shall be  
10 given credit towards his sentence for time previously  
11 spent in prison. It's in the passive voice. It doesn't  
12 say whether it shall be given credit by the AG or also by  
13 a district court. Well, obviously, you could read the  
14 language either way.

15 What I'm having problems here with is that I  
16 don't see any way to read this language so that it comes  
17 out with your favor without putting in three words that  
18 aren't there. And I haven't heard from Justinian -- the  
19 time of Justinian, a court ever having done that, and if  
20 there is a court that did it, it wasn't Wilson.

21 MR. GOLDSTEIN: Okay. I think I'm responding  
22 to --

23 QUESTION: You can have --

24 MR. GOLDSTEIN: I -- I think -- I think we have  
25 a new thread. Perhaps the best answer to your point is

1 Green v. the Bach Laundry, which is not a case that's  
2 discussed in the -- in the briefs, but I will explain how  
3 this arises. And that is, Federal Rule of Evidence 609  
4 said, look, if there's going to be -- if you're going to  
5 impeach a defendant, you get to use prior convictions, and  
6 the Court looked at it and said, really, it says  
7 defendants, and we acknowledge it means all -- you know,  
8 that the plain language of that is all defendants, and the  
9 Court inserted the word criminal and said from the --

10 QUESTION: Inserted the word what?

11 MR. GOLDSTEIN: Inserted the word criminal. It  
12 said that rule 609 would only apply to criminal  
13 defendants.

14 QUESTION: But that's -- you're not missing --  
15 you're missing my point. There are millions of ways --

16 MR. GOLDSTEIN: Yes.

17 QUESTION: -- to read language in a statute --

18 MR. GOLDSTEIN: Yes.

19 QUESTION: -- so that it has a limited scope or  
20 a scope over here or only applies there. That's so common  
21 every day of the week, and very often I look at the policy  
22 and I see if the statute is possibly construed in that way  
23 through that kind of limitation. What I've never seen is  
24 a statute which you just can't word by -- read by limiting  
25 the scope or saying other things like this, et cetera.

1                   MR. GOLDSTEIN: Right.

2                   QUESTION: I've never seen a court just take  
3 three words out of the blue and insert them in that way in  
4 a statute.

5                   MR. GOLDSTEIN: All right. Justice Breyer, I  
6 think that I probably am not going to have a case that  
7 satisfies you, but I think that I can dispute successfully  
8 the premise, and that is, I do believe that your premise  
9 is that expressio unius applies. I promised I would come  
10 back to that point. And the text says, the court may  
11 award to a trustee, an examiner, or professional person.  
12 It doesn't say to only those people. What I'm telling you  
13 is that the other -- the remaining indications of  
14 Congress' intent indicate that Congress did not intend to  
15 limit the payment to go to those people.

16                   And second, this is not a case in which only we  
17 have a textual problem. Remember that the U.S. Trustee,  
18 just as you say we have to read in a -- a word, they have  
19 to read out a word.

20                   QUESTION: Well, they don't have to read it out.  
21 They just say the word is superfluous. There's -- there's  
22 no explanation for why it's there. But, you know, there  
23 are a lot of statutes that have superfluous words, and  
24 that does a lot less violence certainly to the statute to  
25 leave in a word that doesn't have to be there than -- than

1 to insert a phrase, which is what you're asking us to do.

2 MR. GOLDSTEIN: I think you and Justice Breyer  
3 may be making a similar point here, and that is, look, if  
4 we had the text and all we had was the text, it would do  
5 less violence you say, and I think I can concede it would  
6 do less violence to read in the -- the word rather than to  
7 render the other one superfluous or read it out. But I  
8 don't think that's the question before you because you  
9 don't just have the text. If you -- this was all that  
10 there was, you could apply a canon like that one. It  
11 would do less harm, you know, the principle of sort of do  
12 no harm

13 But what I'm telling you is that there is an  
14 ambiguity in the statute, that the provisions of the  
15 payees' and the providers' lists are inextricably  
16 intertwined, that the trustee can be paid for the services  
17 of the trustee, the examiner for services of the examiner,  
18 the professional person for services of the professional  
19 person. And then there's this gap for services of the  
20 attorney. There's an ambiguity. And so just like any  
21 other case in which you have to resolve a statutory  
22 ambiguity, you look to other things.

23 QUESTION: Why don't you just say the first  
24 correction, which is -- or the first, in -- in your view,  
25 slip is the elimination of four words? That's really what

1 they wanted to do because that's the lead provision, and  
2 then in the subsidiary provision, there's only one word  
3 that they left in. So if you -- just looking at the  
4 statute, I assume you would say the lead provision is the  
5 main one and the other, the subsidiary provision, four  
6 words in one case, one word in the other.

7 MR. GOLDSTEIN: I don't think that we have to  
8 get down to the number of words or syllables or anything  
9 like that. I think perhaps a more fair -- if we're --  
10 again, in the world of tie-breakers looking only at the  
11 text, it's that the U.S. Trustee's position requires you  
12 to conclude that there are mistakes in two different  
13 places, in both the payees' list, the missing conjunction  
14 or, and the providers' list, the inadvertent, --

15 QUESTION: But there were umpteen illustrations  
16 of missing or's. I mean, we really can't put much weight  
17 on that.

18 MR. GOLDSTEIN: Well, Justice Ginsburg, I don't  
19 think there's any greater canon that says we find errors  
20 presumptively in second provisions rather than first ones.  
21 There are much greater indications of Congress' intent  
22 than that. We have a lot more to work with.

23 I do think I need to make two points. The first  
24 is Justice O'Connor has, to some extent, focused on what  
25 happened here, you know, what did Congress know. I think

1 it's important to recognize, as I started to say, this  
2 would be a change without any consideration by Congress at  
3 all. This statute started --

4 QUESTION: But how can you say that if this  
5 material I called to your attention was called to the  
6 attention at least of the staff of the committee? Surely  
7 the staff would have recognized that because I presume  
8 they read it, and presumably they would have discussed it  
9 with the Congressmen and said, do you think we ought to  
10 make a change, and somebody said no.

11 MR. GOLDSTEIN: Right, Justice Stevens, let me  
12 distinguish two different periods of time. I was about to  
13 talk about -- and we'll come back to when this -- the  
14 words got dropped out. You're focusing later, and so let  
15 me answer your question with -- try and answer it in a  
16 somewhat different way, and that is, the only thing that  
17 was pointed out to them was that there was a mistake. And  
18 if you look at the text, you don't know what Congress'  
19 intent was. Was it to leave the language in or to delete  
20 it? Because there are two parallel, intertwined  
21 references to the attorney.

22 I had said that I would come back to the '84 --  
23 to the '94 change. This is what the Fourth Circuit  
24 thought was so important. That is, it mistakenly  
25 thought --



1                   QUESTION: May I just get one other thought out?  
2   What is the parallel provision that you say remains in?

3                   MR. GOLDSTEIN: That is the reference in -- I'm  
4   on 2a of the blue brief, 11 U.S.C. 330(a), subsection  
5   (1)(A), what we've called the providers' list. And this  
6   providers' list parallels the one in section 331.

7                   QUESTION: Right.

8                   MR. GOLDSTEIN: Reasonable compensation for  
9   actual, necessary services rendered by the trustee,  
10   examiner, professional person, or attorney. So what  
11   happened is that --

12                  QUESTION: Why -- why couldn't that refer to an  
13   attorney appointed by the trustee?

14                  MR. GOLDSTEIN: Well, it -- as has been  
15   suggested, literally it could. You could render it  
16   surplusage or you could say it's the attorney of the  
17   trustee. But a few things about that.

18                  We know it really is surplusage because there's  
19   already a reference to the attorney of the trustee.  
20   That's the professional person. This was one of the first  
21   questions --

22                  QUESTION: No, but it -- not -- the -- the --  
23   there's another possibility: any attorney employed by the  
24   trustee. And that's not surplusage. You have given me a  
25   reason why there may be a conflict involved if the trustee

1 does employ an attorney for the debtor, but whatever it  
2 is, it's not surplusage.

3 MR. GOLDSTEIN: It is, Justice Souter. The  
4 reference in this line to a professional person is the  
5 professional person employed under section 327. That's  
6 the trustee's attorney. The -- and the United States  
7 doesn't dispute this. It acknowledges that it is  
8 surplusage.

9 QUESTION: No, but if the trustee appoints an  
10 attorney not for himself, but for the debtor --

11 MR. GOLDSTEIN: Ah.

12 QUESTION: -- then it's not surplusage.

13 MR. GOLDSTEIN: I apologize. The trustee is not  
14 empowered to -- I -- I think I may have confused you back  
15 at the beginning of this. The trustee is not empowered to  
16 hire a person to represent the debtor.

17 QUESTION: I -- let me -- let's assume I  
18 misspoke. The trustee may very well be empowered to pay  
19 the person employed by the debtor.

20 MR. GOLDSTEIN: No.

21 QUESTION: That's a way of reading these two  
22 sections together.

23 MR. GOLDSTEIN: Okay. If so, we win.

24 (Laughter.)

25 MR. GOLDSTEIN: And there will be an explanation

1 to follow.

2 QUESTION: I did not expect that answer.

3 MR. GOLDSTEIN: Yes.

4 (Laughter.)

5 QUESTION: Why?

6 MR. GOLDSTEIN: We all should assume that all --  
7 the answer to all the questions, if so, we win, because  
8 what would happen is that, remember, literally the  
9 debtor's attorney may be -- provides compensable services,  
10 and then the ambiguity that Justice Breyer has focused on  
11 and then you have is that we have the question of, okay,  
12 who -- who gets the money. Does it go to the trustee, the  
13 examiner, or the professional person? So if the trustee  
14 gets paid for the services of the debtor's attorney --  
15 remember, this is a case in which Mr. Lami e acted at the  
16 request of the trustee -- then the trustee has to turn the  
17 money over. The money actually belongs to Mr. Lami e. He  
18 provided the services. That's how it would all work  
19 together. And that is, in a case like this one, where the  
20 debtor's attorney acts at the request of the trustee --  
21 this case is your hypothetical. The money goes to the  
22 trustee who then obviously has to turn it over the  
23 attorney. That's who would have the equitable interest in  
24 it.

25 If I could retain the balance of my time.

1 QUESTION: Very well, Mr. Goldstein.

2 Ms. Blatt, we'll hear from you.

3 ORAL ARGUMENT OF LISA S. BLATT

4 ON BEHALF OF THE RESPONDENT

5 MS. BLATT: Mr. Chief Justice, and may it please  
6 the Court:

7 The Bankruptcy Code contains no authority to use  
8 estate funds that are held for the benefit of creditors to  
9 compensate the chapter 7 debtor's attorney. Before 1994,  
10 the code authorized estate funds to be used to compensate  
11 all debtors' attorneys, but the 1994 amendments  
12 unambiguously deleted the chapter 7 debtors' attorneys  
13 from the class of persons eligible to receive compensation  
14 under the statute.

15 QUESTION: It eliminated them unambiguously I  
16 guess from the class of persons entitled to be paid  
17 directly, but did it eliminate them from the class of  
18 persons who might ultimately be compensated, i.e., the  
19 class in -- in -- what is it? Subsection (a).

20 MS. BLATT: Yes. Only the -- if -- an attorney,  
21 including the debtor's attorney, can still be compensated,  
22 but he has to be appointed by the court under section 327  
23 and then he stands as a professional person that's  
24 retained under 327, but that has to be retained under 327.

25 QUESTION: So -- so the -- so the reference is

1 surplusage in (a).

2 MS. BLATT: It's superfluous in this sense. Our  
3 reading of the statute is the same regardless because the  
4 attorney is nothing more than a subset of professional  
5 persons.

6 QUESTION: Yes.

7 MS. BLATT: But Congress may -- it may have  
8 failed to make a conforming change, but it's also possible  
9 that Congress specifically left the word in because  
10 Congress often uses overlapping terms to accomplish its  
11 objectives. And it was doing no harm there, and it would  
12 at least remove any doubt that even the debtor's attorney  
13 could be paid as long as he qualified as a professional  
14 person that was retained under 327.

15 QUESTION: But the word attorney in 330 would  
16 then have a different meaning after the amendment than it  
17 had before because before the amendment, it clearly  
18 referred to the debtor's attorney, did it not?

19 MS. BLATT: That's correct, but there's no  
20 question that the -- the code, as it now stands, has --  
21 omits the debtor's attorney from one of the authorized  
22 people. And what petitioner is basically seeking, Justice  
23 Stevens, is a substantive enlargement of the code because  
24 he wants to do something, that is, receive a --

25 QUESTION: Well, he's arguing the word attorney

1 means the same thing it always meant. In other words, in  
2 330.

3 MS. BLATT: That's fine. The debtor's --

4 QUESTION: And you're saying it means something  
5 different.

6 MS. BLATT: It could still mean the debtor's  
7 attorney, but there's no question in this case petitioner  
8 was not authorized to be retained by the trustee under  
9 section 327. The debtor's attorney is unambiguously not  
10 one of the list of people in 330(a) who is authorized to  
11 receive compensation, just like a creditor's attorney is  
12 not on that list or a debtor's spouse is not on that list.

13 QUESTION: Why does it make any sense,  
14 considering that the code does give obligations, duties  
15 that must be done by the chapter 7 debtor? And some of  
16 them are pretty complex.

17 MS. BLATT: Well, I think it reflects the  
18 fundamental distinction between chapter 7 and all other  
19 codes. That's chapters 11, 12, and 13. In a chapter 7  
20 case, the bulk of the work is done pre-petition. It's  
21 advising the debtor about which chapter to file, filling  
22 out the schedules, telling the debtor what property is  
23 exempt, and so forth. And in chapters 11, 12, and 13, the  
24 whole game is in doing a plan which is all post-petition,  
25 and the trustee and the debtor, the -- excuse me -- the

1 debtor and the creditors work together to figure out a  
2 plan.

3 QUESTION: But -- but why doesn't that help the  
4 petitioner? As Justice Ginsburg is indicating, before the  
5 petition is filed, a chapter 7 debtor has to comply with  
6 some rather complex forms, plus be advised of -- of his  
7 duties and liabilities. Don't take assets out the back  
8 door and so forth. So there's a chronological problem  
9 here that -- the -- the trustee can't appoint the attorney  
10 until the proceeding is filed, but the attorney is really  
11 required to do some advance work.

12 MS. BLATT: Justice Kennedy, there's no question  
13 that both before and after the 1994 amendments, chapter 7  
14 debtors retained counsel, but they do so in the  
15 overwhelming majority of cases with a pre-petition flat  
16 fee, usually \$750-\$850. They pay their lawyer pre-  
17 petition.

18 QUESTION: And that can be paid.

19 MS. BLATT: Absolutely.

20 QUESTION: That is paid the lawyer --

21 QUESTION: Is it established that's not  
22 avoidable preference?

23 MS. BLATT: Absolutely. It's in the ordinary  
24 course of --

25 QUESTION: For current services?

1 MS. BLATT: Yes. This is done day in and day  
2 out. United States Trustees have supervised the  
3 liquidation of a million cases each year.

4 QUESTION: It would be avoidable preference if  
5 it's too high, wouldn't it?

6 MS. BLATT: If it's too high, but I'm talking  
7 about the standard, routine fee of under \$1,000 if  
8 somebody walks in because they've been overwhelmed by  
9 credit card debts or gambling debts or had a divorce, they  
10 need representation on how to fill out the schedules, what  
11 types of property are exempt, and they retain counsel, the  
12 counsel takes that money, gets the standard flat fee, that  
13 -- and all the services are earned pre-petition with one  
14 exception.

15 QUESTION: What if the -- what if the check  
16 bounced and there's now been a conversion to 7 and the --  
17 and the lawyer says, I ought to be paid for my 11 work?  
18 On your theory, does he get paid?

19 MS. BLATT: Not out of estate funds. He should  
20 probably clear -- have the check cleared before he  
21 performs the services.

22 QUESTION: He clears the check.

23 QUESTION: Yes.

24 MS. BLATT: Bankruptcy counsel do this --

25 QUESTION: So you're saying at this point,



1 regardless of chapter 11 work, chapter 7 work, no payment  
2 out of the -- the estate funds.

3 MS. BLATT: Not out of estate funds, but it's --  
4 it's critical to understand that in chapter 7, unlike all  
5 other chapters, the -- the estate is frozen at the time of  
6 petition. 98 percent of all chapter 7 debtors are  
7 individuals. If they have a job or any post-petition  
8 income or there are exempt assets, they can use that money  
9 to pay the -- pay counsel to assist them in completing  
10 bankruptcy.

11 And I want to -- do want to address one very --  
12 one class of very important services that came up that I  
13 think, Justice Souter, you raised, and that is when the  
14 debtor and the trustee or creditors are fighting over  
15 objections to exemption. They could also be fighting over  
16 objections to discharge. These are serious matters where  
17 often the debtor is accused of misconduct and the debtor  
18 will need a lawyer. There's no question that even before  
19 the 1994 amendments, the overwhelming majority of courts  
20 would have held that those are services that benefit the  
21 personal -- that go to the personal benefit of the debtor  
22 and not the estate. And they would not have been  
23 compensable even before 1994, and if this -- if this Court  
24 is going to take the extraordinary step of writing it back  
25 in, it will not affect those cases. And so --

1                   QUESTION: Let me ask you about --

2                   MS. BLATT: Sure.

3                   QUESTION: -- a provision of the statute you

4 didn't include in your brief, or at least in the appendix.

5 Section 329 --

6                   MS. BLATT: Yes.

7                   QUESTION: -- specifically authorizes the

8 debtor's attorney to receive a retainer, as I understand

9 it.

10                  MS. BLATT: That's for the code as it -- what --

11 this is a -- a pro-creditor provision that recognizes that

12 debtors will often go to counsel before they file

13 bankruptcy, and anyone, whether or not you seek

14 compensation under the statute, any lawyer for any debtor

15 who ultimately files for bankruptcy has to disclose their

16 fee arrangement, and the court can order the cancellation

17 of it or return of the fee if it's excessive or

18 unreasonable.

19                  QUESTION: But -- but if the court does not

20 order a cancellation of it, it seems to me that provision

21 contemplates a payment to the debtor's attorney for his

22 services to the debtor.

23                  MS. BLATT: Pre-petition. This is for a -- any

24 type of fee arrangement that's pre-petition whether or not

25 you apply for compensation. There are many cases where

1 the chapter -- excuse me -- the debtor's counsel will, in  
2 fact, be paid under 12, under 13, under 11, and those --

3 QUESTION: This refers to 7. I think 329  
4 applies to chapter 7 cases.

5 MS. BLATT: Right. Any -- any debtor. Even if  
6 there was an express prohibition for money for the estate  
7 to be paid, section 329 would still independently operate  
8 to require the counsel to disclose his fee agreement. It  
9 applies whether or not compensation is ever sought under  
10 330.

11 QUESTION: Well, in section (b), it authorizes  
12 the court to cancel it -- cancel the agreement if it's  
13 unreasonable compensation. So it seems to me it applies  
14 that if the compensation was reasonable, they could  
15 approve it.

16 MS. BLATT: Right, but that's -- that's pre-  
17 petition.

18 QUESTION: Well, I understand, but the money has  
19 to be paid pre-petition. Here, of course, it was, but he  
20 kept it in escrow instead of putting it in his pocket.

21 MS. BLATT: That's right. So it remained the  
22 funds of the estate and it had to be paid under 330 and it  
23 was -- it was not a question of 329.

24 But the other -- other point I want to get back  
25 on why this serves reasonable policy objectives, not only

1 does the individual debtor have the ability to pay counsel  
2 with either his exempt assets, his post-petition income,  
3 or a pre-petition flat fee, but chapter 7, unlike all  
4 other cases, it is the trustee and not the debtor who  
5 manages, represents, and liquidates the estate. And the  
6 code gives the trustee the explicit authority under  
7 section 327 of the code to retain counsel, including the  
8 debtor's counsel, to take actions that further the benefit  
9 -- the best interests of the estate.

10 QUESTION: But not that would assist the debtor  
11 in the exemption example.

12 MS. BLATT: No. That's exactly right. If the  
13 -- if for some reason the trustee could not read an  
14 accounting form and the debtor's counsel couldn't answer  
15 it, the trustee can go retain a professional person like  
16 an accountant, and if the trustee needs a lawyer to take  
17 actions to further the best interests of the estate, it is  
18 true that that lawyer represent the -- represents the  
19 estate, but there's no reason he can't meet with the  
20 debtor and help him explain something.

21 But 96 percent of all chapter 7 cases, there are  
22 no assets in the estate to begin with. These are the kind  
23 of cases I was talking about, where they are covered by a  
24 routine flat fee that covers --

25 QUESTION: I really don't understand that

1 argument because this case just involves the other 4  
2 percent, and there are a lot of cases in the 4 percent,  
3 aren't there? Several thousand.

4 MS. BLATT: That's true, and in those cases --

5 QUESTION: So what difference does it make that  
6 96 percent -- it doesn't make any difference. I don't  
7 understand that argument.

8 MS. BLATT: I think it goes to the idea that  
9 given that there's a plain absence of any statutory  
10 authority to do this, the question is, is this some sort  
11 of absurd result that Congress could not have plausibly  
12 intended? And in the 4 percent of categories where there  
13 are assets, Justice Stevens, the trustee represents the  
14 estate. He manages it and he liquidates it. And if  
15 there's money to be paid to -- for counsel and the  
16 counsel's services are needed, the trustee can use that  
17 money and retain counsel. At the same time, the chapter 7  
18 debtor --

19 QUESTION: Has retained counsel to do work to  
20 benefit the estate, not retained counsel to represent the  
21 debtor.

22 MS. BLATT: That's right. And at the same time,  
23 there is --

24 QUESTION: Which he could have done before 1996.

25 MS. BLATT: Right. And there's nothing in the

1 1994 amendments that prevents the debtor from taking his  
2 post-petition salary, his exempt assets --

3 QUESTION: Not if he's a company, as in this  
4 case.

5 MS. BLATT: Right. In a -- in a company, Your  
6 Honor, it's important, Justice Ginsburg, to keep in mind  
7 everything like objections to discharge, exempt assets --  
8 none of that applies to corporations. Corporations,  
9 unlike individuals, do not survive bankruptcy, and so they  
10 don't have issues like exempt assets and objections to  
11 discharge. You have a defunct corporation that's  
12 liquidating.

13 And we think this case is a perfect illustration  
14 of what happens when you have a case with marginal assets  
15 in chapter 7, and that's usually where the -- the  
16 businesses with no assets or marginal assets go, is  
17 chapter 7. The trustee had ample authority to retain  
18 petitioner's counsel, and in fact, what happened  
19 ultimately in this case is what -- the bulk of what  
20 petitioner's counsel was doing was representing the estate  
21 in a fight with a creditor and --

22 QUESTION: Well, he didn't have ample authority  
23 to do it before the chapter 7 was filed, did he?

24 MS. BLATT: No. When the case is in chapter 11,  
25 the debtor is the debtor in possession with all the powers

1 and duties of the trustee, and it's solely the debtor.  
2 There is no trustee. The debtor has to take actions to  
3 represent the estate. All that changes when it converts  
4 to a 7. Then it's the trustee. The keys have to be  
5 turned over to the trustee and the trustee runs the show.

6 QUESTION: But -- but I thought you indicated  
7 that the trustee had ample authority to hire the debtor's  
8 attorney, and I -- in the chapter 7 proceeding, and I  
9 said, true, but does he have the authority to hire the  
10 debtor's attorney before the chapter 7 is filed? That's  
11 what we're talking about. He doesn't have that authority.

12 MS. BLATT: This -- I mean, I'll try to take you  
13 chronologically. The case started out an 11, and then the  
14 petitioner was -- was retained under section 327, had a  
15 specific order, and therefore was entitled to be paid from  
16 the estate. Once the case --

17 QUESTION: For work done from that time forward.

18 MS. BLATT: Work done just while it was an 11.  
19 Once it's in a 7, all those duties ceased. There was  
20 nothing for the corporation to do except liquidate and  
21 cooperate with the trustee, who had the statutory  
22 responsibility to represent and manage and liquidate the  
23 estate.

24 QUESTION: Well, there's no trustee until  
25 chapter 7, is there?

1 MS. BLATT: That's right. Right. Once -- once  
2 it converts to chapter 7, then it's the trustee's job to  
3 take over. And the trustee eventually did take over the  
4 adversary proceeding and bring the -- continue the case  
5 against the creditor.

6 QUESTION: And he can hire the -- and he can  
7 hire the debtor's attorney to do work in the chapter 7,  
8 but that doesn't compensate for what -- the work that was  
9 done before chapter 7.

10 MS. BLATT: That's right.

11 QUESTION: The work that was done before chapter  
12 7 was compensated in this case.

13 MS. BLATT: Yes, it was paid. There was \$2,000  
14 of fees in this case and \$3 in expenses, and \$1,000 has  
15 been paid for all the work in 11. And what will happen,  
16 if the Court affirms the Fourth Circuit, is when cases  
17 convert, the debtor's counsel will cease performing work  
18 unless the trustee actually gets a court order approving  
19 their retention. The trustee can hire its own lawyer to  
20 assist with its -- with -- with his or her duties and can  
21 hire the debtor's counsel for a special purpose. And that  
22 would have been like this case where there's an adversary  
23 proceeding either by or against the debtor.

24 United States Trustees have supervised and  
25 overseen the liquidation of millions of chapter 7 cases in



1 the 9 years since the 1994 amendments, and it has been  
2 their experience that the statute, as written, has not  
3 interfered with the smooth functioning of chapter 7 cases.

4 QUESTION: Are all trustees in chapter 7 cases  
5 United States Trustees? They're not, are they?

6 MS. BLATT: None of them are. The United States  
7 Trustees supervise and oversee the administration of all  
8 cases under 7, 11, 12, and 13, and one of their specific  
9 duties is to supervise trustees, private trustees, who --  
10 who perform their -- their jobs and duties as trustees.

11 QUESTION: Even if the Government isn't involved  
12 in the case.

13 MS. BLATT: Right. There's always a -- there's  
14 always a private trustee appointed except in 11 cases, but  
15 the United States Trustees supervises and oversees, serves  
16 as a watch dog, looks at things to make sure there's no  
17 waste, fraud, or abuse, reviews all fee applications for  
18 the -- by the trustee, the examiner, the debtor's counsel  
19 in chapter 11 cases, and --

20 QUESTION: The bankruptcy judge appoints the  
21 trustee.

22 MS. BLATT: I don't know if -- Justice Ginsburg,  
23 I'm not sure whether it's the -- the bankruptcy court does  
24 appoint the trustee. That's right. But the United States  
25 Trustees within the Department of Justice manages a pool

1 of available trustees who can serve to be appointed by  
2 bankruptcy courts. And so we oversee trustees and make  
3 sure they're fulfilling their duties.

4 QUESTION: Does the bankruptcy court appoint a  
5 U.S. Trustee in every single case?

6 MS. BLATT: No, no. There are -- no. There are  
7 21 United States Trustees that oversee all the regions of  
8 this country, with the exception of North Carolina and  
9 Alabama, and they just overview and supervise the  
10 administration of the cases in the sense of make sure that  
11 the cases are actually proceeding through the court, make  
12 sure that cases that need to be converted --

13 QUESTION: They -- they do that without any  
14 appointment by the bankruptcy court then I take it.

15 MS. BLATT: That's right. Under 28 U.S.C. 586,  
16 it's -- it's a laundry list of specific statutory duties  
17 that the United States Trustees have to comply with.  
18 Under the Bankruptcy Code itself, in 11 U.S.C. 307, it  
19 says that the United States Trustees may be -- may raise  
20 or be heard on any matter in any bankruptcy case, and  
21 that's why they've been in all of these cases involving  
22 fee applications because in their view, given the -- that  
23 there's just complete absence of any statutory authority  
24 to pay chapter 7 debtor's counsel, they've been objecting  
25 to fee requests.

1           The one thing I just want to get back to on the  
2 statute is petitioner says that the statute is ambiguous,  
3 and we could not disagree more. There is no language in  
4 the code that authorizes the chapter 7 to be paid. What  
5 petitioner has relied on is a missing or and this  
6 overlapping or redundant reference to attorney. But it's  
7 critical to understand that nothing about the missing or  
8 or the reference to attorney in (a)(1)(A) affects the  
9 substantive meaning of the statute or in any way prohibits  
10 the Court from applying the literal language of the code  
11 or requires the code to do -- requires the Court to do  
12 something the code prohibits.

13           By contrast, what petitioner is seeking is a  
14 substantive enlargement, and as far as we can tell, there  
15 is no case of this Court's jurisprudence where the Court  
16 has added back language in a statute and where -- in a  
17 substantive way that Congress has specifically taken out  
18 when there's no language that will bear that  
19 interpretation.

20           If there --

21           QUESTION: If you're through, let me just --

22           MS. BLATT: Sure.

23           QUESTION: Maybe this is a little repetitious,  
24 but I want to read you two sentences from Collier on  
25 Bankruptcy, the treatise that most of us rely on perhaps

1 too much in this area.

2 After describing the Government's position in  
3 this, it would represent a fundamental change in the law.  
4 The treatise goes on. Section 329 of the code permits the  
5 debtor's attorney to receive a reasonable retainer for  
6 services rendered in contemplation of or to be rendered in  
7 connection with a case under the Bankruptcy Code. Such a  
8 provision would be superfluous if the deletion in section  
9 330(a) is construed as excepting debtor's counsel from  
10 compensation under section 330.

11 What's your response to that again? You've  
12 partly responded, but I want to be sure you cover it all.

13 MS. BLATT: This is the reference to attorney,  
14 the reference to attorney in (a)(1)(A).

15 QUESTION: Yes.

16 MS. BLATT: Your Honor, it's -- the -- the short  
17 answer it's -- it's in the wrong place. The critical  
18 operative list that provides the type of people who can  
19 receive compensation is in (a)(1), and the reference to  
20 attorney just describes the type of compensable services,  
21 which also includes paralegals, para-professionals.

22 QUESTION: No. They -- they rely on section  
23 329, which talks about --

24 MS. BLATT: Oh, I'm -- 329.

25 QUESTION: -- that that's -- they say section

1 329 permits all this, and they say that provision would be  
2 superfluous if your reading of 330(a) is correct.

3 MS. BLATT: Collier is just wrong. The  
4 provision is --

5 (Laughter.)

6 MS. BLATT: -- on this point -- is that it  
7 operates independently and requires a disclosure of all  
8 fee agreements whether or not there's compensation, and  
9 maybe another way of putting it is whether or not the  
10 Court rewrites the code, 329 is going to apply as -- as it  
11 always has and require a disclosure of -- of pre-petition  
12 fees.

13 QUESTION: What was the -- the fees that were  
14 attributed to the chapter 11 phase, when approval was  
15 sought, wasn't that under 329 when -- there -- there was  
16 the -- the lump sum \$6,000, and something over \$1,000 was  
17 attributed to the pre-petition chapter 11 time. Wasn't  
18 the approval of that under this section 329?

19 MS. BLATT: Yes, Justice Ginsburg, by both the  
20 bankruptcy court and the district court because they  
21 proceeded on the erroneous assumption, as found by the  
22 Fourth Circuit, that this was money that belonged to the  
23 lawyer instead of the estate. And if it had been -- and  
24 this was an 11 case. You don't see in chapter 7 large  
25 pre-petition retainers like this because the chapter 11

1 usually contemplates ongoing work after bankruptcy.

2 But in this case, they did what most lawyers do,  
3 is put the money in the trust account, and it wasn't  
4 earned -- it wasn't earned by the lawyer until the  
5 services were performed. But the bankruptcy court and the  
6 trial court proceeded on the assumption the money belonged  
7 to the lawyer, and so if the -- if the pre-petition money  
8 is money of the lawyers, then it's reviewed under 329.

9 But then the Fourth Circuit said, well, no, this  
10 is actually money of the estate and it has to be -- it's  
11 estate funds. Those are held for the benefit of creditors  
12 and there's no statutory authority to use estate funds to  
13 pay the chapter 7 debtor's attorney.

14 If there are no questions, we'd ask the Court to  
15 affirm the Fourth Circuit's --

16 QUESTION: Very well, Ms. Blatt.

17 Mr. Goldstein, you have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

19 ON BEHALF OF THE PETITIONER

20 MR. GOLDSTEIN: Mr. Chief Justice, the reason  
21 that the U.S. Trustees are not finding that this ambiguity  
22 creates a problem is that there has been a shift in  
23 practice in those courts like the Fourth Circuit that hold  
24 that you can't be compensated as a chapter 7 debtor's  
25 attorney under 330, and that is people in bigger cases are

1 getting bigger and bigger retainers. What's happening is  
2 the scenario that Justice Stevens described, and that is,  
3 people are saying I'm not going to be paid on an ongoing  
4 basis, so I've got to get more money up front. That can't  
5 be a result that Congress contemplated under the U. S.  
6 Trustees' vision of what Congress was up to --

7 QUESTION: But can't that be checked by the  
8 court under 329 and say that's too much?

9 MR. GOLDSTEIN: Precisely, precisely. But  
10 that's my point. What results is the 329 fees are subject  
11 to a Lessing standard. They just have to be reasonable.  
12 They aren't subjected to all the laundry list of 330. So  
13 the result of this change, if there was a change, would  
14 only have been to decrease judicial oversight. Retainers  
15 are subject to less to judicial scrutiny.

16 The second point I should make is that don't  
17 come away from the argument that this -- believing that  
18 this case is limited to chapter 7. It applies equally to  
19 chapter 11 debtor out of possession cases and chapter 12  
20 and 13 cases for services that are beneficial to the  
21 estate, but not the debtor. The U. S. Trustee has always  
22 pitched this as somehow a case limited to chapter 7, but  
23 that's not accurate. And the Pro-Snax case from the Fifth  
24 Circuit, for example, is a chapter 11 debtor out of  
25 possession case.

1                   Third, Justice Souter, I still don't understand  
2 what the answer is to your reading of the statute.

3                   Justice Breyer, Justice Souter said, okay, there  
4 are a list of three people who can get the check: the  
5 trustee, the examiner, the professional person. Fine.  
6 But we also know, as Justice Stevens has said, that the  
7 statute's reference to the attorney has always been to the  
8 attorney, the same reference to the attorney in 331 is a  
9 reference to the attorney. 321 says a chapter 7 attorney  
10 can get a retainer. Justice Souter has said isn't the  
11 literal language, if we're going to follow the literal  
12 language, that the money can go to the trustee, to which I  
13 said, and that's -- you know, the trustee directed Mr.  
14 Lami e to do these things, and therefore the trustee just  
15 owes the money back to the debtor's attorney. That  
16 rationalizes all of the text.

17                   The important thing then in deciding whether to  
18 follow the literal text is, is there anything to support?  
19 Is there a whit -- a whit -- of indication in the history  
20 of the statute that Congress intended to do what the U. S.  
21 Trustee has hypothesized? Is there a word that from 1898  
22 to 1994 Congress decided to make this choice to eliminate  
23 fees that are both necessary and beneficial? Those are  
24 the only fees we're talking about, those that benefit the  
25 creditors. Did Congress intend to eliminate them? Is



1   there any indication of that? And the answer to that  
2   question is no.

3                   And that's important because the U.S. Trustee is  
4   not correct to say that when a chapter 7 is initiated or  
5   if the case is converted, that the debtor and the debtor's  
6   attorney leaves the field. There are ongoing duties.  
7   There's the 341 hearing, the meeting with the creditors.  
8   There is the duty of the debtor's attorney to transfer the  
9   materials to the trustee, to cooperate with the trustee.  
10   Here, there was an adversary proceeding. The trustee  
11   wasn't substituted as counsel for 8 months, and somebody  
12   had to tell the trustee about that. There are real  
13   responsibilities. And we're not talking about, in any  
14   particular case, a ton of money, but it is important.

15                  CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
16   Goldstein.

17                  The case is submitted.

18                  (Whereupon, at 10:54 a.m., the case in the  
19   above-entitled matter was submitted.)  
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